2002

Elizabeth Ann Millsap v. Alan Sokolow : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ELIZABETH ANN MILLSAP, by and through her guardian ad litem, **LORRAINE COWGILL**, Plaintiff-Appellant, -vs- **ALAN SOKOLOW, M. D.**, Defendant-Respondent.	Case No. 20524

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, THE HONORABLE JOHN A. ROKICH, DISTRICT JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

D. Treatises

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BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, THE HONORABLE JOHN A. ROKICH, DISTRICT JUDGE

ISSUES FOR REVIEW

This appeal presents only one issue for review: Does § 78-12-35, Utah Code Ann. (1953),[1/] toll the medical malpractice statute of limitations while a prospective defendant

1/ All statutory citations are to the Utah Code Annotated unless otherwise noted.

is absent from the state but is still subject to the personal jurisdiction of its courts under the Long-Arm Statute?

DETERMINATIVE PROVISIONS

Set forth in Addendum II are the statutory provisions which may be determinative of the issue presented: § 78-14-4 (the medical malpractice statute of limitations); § 78-12-35 (the nonresident tolling statute); §§ 78-27-24 and 25 (relevant sections of the Long-Arm Statute); and § 41-12-8 (the Nonresident Motorist Act).

STATEMENT OF THE CASE

I. Nature Of Action.

This is a medical malpractice action. Plaintiff, Lorraine Cowgill, is the mother of the decedent, Shannon Millsap, and the guardian ad litem of Elizabeth Ann Millsap, the decedent's minor daughter. Defendant, Alan Sokolow, M. D., is a physician living in Connecticut who, at the time of the alleged negligence, was a physician in residency at L.D.S. Hospital in Salt Lake City.

Shannon Millsap died on April 11, 1980, after suffering a stroke-like neurological event on the evening of April 9, 1980. She had been examined on the morning of that day by defendant and another physician at the L.D.S. Hospital emergency room, where she had gone with complaints of persistent facial headaches

and blurred vision. After being seen by the physicians and given diagnostic tests, she was discharged and went home.

Plaintiff alleges that defendant was negligent in failing to perform an adequate neurological examination on Ms. Millsap, in not scheduling her for an examination that day by a neurologist, in prescribing inappropriate medications, and, generally, in discharging Ms. Millsap when he should have admitted her. [See, Second Amended Complaint, Record at 16.]

II. Course Of Proceedings.

The Complaint was filed against Dr. Sokolow and L.D.S. Hospital on June 16, 1983. [R. 2] An Amended Complaint was filed on March 5, 1984. [R. 6] Shortly thereafter, Dr. Sokolow was served with process at his home in Connecticut, whereupon he moved to dismiss the Amended Complaint on the ground that it contained a monetary prayer for relief prohibited by § 78-14-7. The parties stipulated that a Second Amended Complaint could be filed without the objectionable demand, and it was so filed on March 30, 1984. [R. 16]

All claims against L.D.S. Hospital were voluntarily dismissed with prejudice by plaintiff in April 1984, for the stated reason that her claims against that defendant had been settled and compromised. This left Dr. Sokolow as the sole defendant. [R. 45]

Defendant took the deposition of plaintiff on June 22, 1984. The parties exchanged written discovery requests [R. 25, 32, 47, 57] and defendant then moved for summary judgment on the ground that this action was barred by the applicable two-year statute of limitations, § 78-14-4. [R. 40] The basis for the motion was that plaintiff had admitted discovery of her "injury" by mid-summer of 1980 -- when she had received an informed medical opinion that there had been negligence -- yet delayed in commencing this suit until well more than two years thereafter.[2/]

Plaintiff did not dispute that she had discovered her "injury" more than two years before commencing this action. [See, Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment, R. 81 and Rule 2(h)

2/ Throughout the proceedings below, defendant took March 5, 1984, to be the date of the commencement of the action against him, under a mistaken belief that he was not named as a party in the original Complaint since he was not served with it. It is now clear that defendant was a party in the original Complaint, filed June 16, 1983, and that this earlier date should be taken as the "commencement" date. It makes no difference to the limitations issue since June 16, 1983, is also more than two years after the admitted date of discovery.

Third Judicial Court Rules of Practice.[3/] Nor does she dispute it here. Rather, plaintiff contends that the statute of limitations is tolled by § 78-12-35 because defendant was continuously absent from Utah from May 1980 until the present.

III. Disposition In Lower Court.

The lower court, Honorable John A. Rokich presiding, rejected plaintiff's contention that the limitations period was tolled by § 78-12-35 and, accordingly, entered judgment in favor of defendant on January 29, 1985. [Order Granting Defendant's Motion for Summary Judgment, Addendum I and R. 92] This appeal followed.

IV. Relevant Facts.

The following facts are relevant to the issue presented for review in this appeal:

1. This is a "Malpractice Action Against a Health Care Provider," as that phrase is defined by § 78-14-3(29). As such, a two-year statute of limitations running from the date of discovery of the injury applies. § 78-14-4; Foil v. Ballinger, 601 P.2d 144 (Utah 1979).

3/ Rule 2(h) requires an opposition memorandum to concisely dispute any material facts alleged by the movant to be undisputed or waive the point.

2. Plaintiff discovered her injury not later than mid-summer of 1980. [See discussion, supra]

3. This action was commenced on June 16, 1983. [Complaint, R. 2]

4. Defendant, a resident of Utah as of the date of the alleged negligence, April 9, 1980, moved in May of that year to New York State and, later, to Connecticut. He has not been a resident or physically present in Utah since that time. [Defendant Sokolow's Answer to Plaintiff's Second Amended Complaint, R. 20; Defendant's Answers to Plaintiff's First Set of Requests for Admissions and Interrogatories, Addendum to Appellant's Brief]

SUMMARY OF ARGUMENT

Section 78-12-35 provides:

> Effect of absence from state. If when a cause of action accrues against a person when [sic] he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

The issue on this appeal is a simple one: If § 78-12-35 tolls the statute of limitations, this action was timely commenced

and the lower court should be reversed. If it does not, the action is barred and the lower court should be affirmed.

Defendant's contention, and the view of the lower court, is that § 78-12-35 applies only when a defendant is both physically absent from this state and not subject to the personal jurisdiction of its courts. That interpretation of the statute has already been reached by this Court where personal jurisdiction over a nonresident defendant was obtained under the Nonresident Motorist Act, § 41-12-8. There exists no principled distinction between that and personal jurisdiction obtained under the Long-Arm Statute, § 78-27-22 et seq. In either case, no reason to toll the limitations statute exists.

ARGUMENT

SECTION 78-12-35 ONLY APPLIES WHEN A PROSPECTIVE DEFENDANT IS BOTH PHYSICALLY ABSENT FROM THIS STATE AND NOT SUBJECT TO THE PERSONAL JURISDICTION OF ITS COURTS.

I. This Court has Previously Held that § 78-12-35 Requires Both Physical Absence and Non-Amenability to Service of Process.

This Court has already held that § 78-12-35 is not to be read literally but, rather, with a view to its intended purpose. In Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915 (1964), Mrs. Snyder, a Utah resident, sued defendants, California residents, for personal injuries she suffered in a Utah County auto accident.

Her Complaint was filed three days past the expiration date of the four-year statute of limitations. Jurisdiction over defendants was obtained in accordance with the Nonresident Motorist Act, which authorizes service of process upon nonresident motorists by serving the Secretary of State, who is deemed to be the "agent" of nonresident motorists for that purpose.

Mrs. Snyder contended that § 78-12-35 tolled the limitations statute since defendants had returned home to California shortly after the accident and had not been back. This Court, in an opinion written by Justice Crockett, reversed the lower court's decision and ordered the action dismissed as untimely. The "obvious objective" of § 78-12-35, according to the Court, was to prevent a prospective defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state until the limitations period had expired. 15 Utah 2d at 256, 390 P.2d at 916.

Since defendants had a fictitious agent in Utah process could have been served. They were not, thus, "absent" in the sense contemplated by the statute; that is, unavailable for service of process. Nothing prevented Mrs. Snyder from serving them at any time she desired and there existed no reason

for tolling the running of the statute. "When the reason for the rule is gone, the rule should vanish with it." Id.[4/]

Any other interpretation of § 78-12-35, said the Court, would have allowed the claim to rest in suspense for an indeterminate number of years, even though Mrs. Snyder could have served process whenever she wanted to. That result would have comported with neither reason nor justice. Id.[5/]

Utah's Long-Arm Statute, § 78-27-22 et seq., provides that any person causing tortious injury in Utah is subject to the personal jurisdiction of its courts. § 78-27-24(3). Service of process upon such a person is made in accordance with Rule 4, Utah Rules of Civil Procedure. Personal service outside

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4/ Unspoken in the opinion is what the "reason" for the tolling statute is: the inability to obtain personal jurisdiction over nonresidents who committed torts in this state until the advent of the "ficticious agent" and "long-arm" statutes. As of 1903, the date § 78-12-35's predecessor was enacted, a defendant could apparently avoid a civil suit by leaving the state until the statute of limitations expired. See, Comp. Laws 1907, § 2888.

5/ Overruling Keith O'Brien Co. v. Snyder, 51 Utah 227, 169 P. 954 (1917); Buell v. Duchesne Mercantile Co., 64 Utah 391, 231 P. 123 (1924); and Seeley v. Cowley, 12 Utah 2d 252, 365 P.2d 63 (Utah 1961).

the state has the same force and effect as if served in Utah. Id. This defendant was, in fact, personally served with the Summons and the Amended Complaint in Connecticut in accordance with the Long-Arm Statute.

Defendant has always been subject to the personal jurisdiction of the courts of this state for his alleged tort. He was never unavailable for service of process and never "absent" in the sense contemplated by § 78-12-35. Nothing prevented plaintiff from suing him before the expiration of the limitations period. As in Snyder, there existed no reason for tolling the limitations statute.

Where lies the distinction between nonresidents subject to jurisdiction under the Nonresident Motorist Act and nonresidents subject to jurisdiction under the Long-Arm Statute? Nothing in either instance prevents a timely filing of suit. The method of service of process -- ficticious agent or personal service -- is unimportant. The fact that personal jurisdiction exists is determinative.

II. Other Jurisdictions That Have Considered Similar Tolling Statutes Generally Agree That Lack Of Personal Jurisdiction Is A Prerequisite For Tolling.

There are many reported decisions from other courts that have considered this issue. See, generally, Annot., 55

A.L.R.3d 1158 (1974) and 51 Am. Jur. 2d, Limitation of Actions §§ 154-160 (1970).[6/]

Most courts agree that tolling or "savings" statutes like § 78-12-35 do not apply if a prospective defendant is physically absent from a state but subject to service of process. For example, see, Beedie v. Shelley, 610 P.2d 713, 715 (Mont. 1980) (Holding that a Montana statute nearly identical to § 78-12-35 was not tolled by the nonresidence of a defendant subject to process under the Montana Long-Arm Statute.); Bray v. Bayles, 618 P.2d 807, 810 (Kan. 1980) (A similar holding under Kansas statutes.); Williams v. Malone, 592 S.W.2d 879, 881 (Mo. App. 1980) (Missouri Long-Arm Statute similarly interpreted.); Lipe v. Javelin Tire Co., Inc., 536 P.2d 291, 294 (Idaho 1975) (Nearly identical tolling and long-arm statutes in the Idaho Code are interpreted.); and Summerrise v. Stephens, 454 P.2d 224, 227 (Wash. 1969).

In Summerrise v. Stephens, the Washington Supreme Court held that a medical malpractice action was not tolled

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6/ An extensive, but not exhaustive, compilation of the reported decisions is found in Addendum III.

by Washington's nonresident tolling statute where the defendant doctor, although a nonresident, was always subject to personal service under the Washington Long-Arm Statute. The Court indicated that a defendant's absence from the state must be such that process could not be served upon him:

> The purpose of the statute of limitations is to compel actions to be commenced within what the legislature deemed to be a reasonable time, and not postponed indefinitely. However, the statute's operation could be tolled for what the legislature regarded as a good reason, i.e., the inability to get personal service on a defendant by reason of his absence from the state. That reason having been removed in certain classes of cases by the Long-Arm Statute, the tolling provision in such cases is no longer necessary, and the statute of limitations should again be permitted to perform its purpose of expediting litigation.
>
> There is a compelling consideration of public policy also favoring the answer we have given. To hold otherwise would allow suits against nonresidents of the state upon whom personal service can be obtained to be postponed indefinitely. The evil results of long delay are too obvious to require recitation. We should not ascribe to the legislature an intent which would lead to such unfortunate consequences.

454 P.2d at 227. (citations omitted).

The Court noted that its earlier decision in Smith v. Forty Million, Inc., 395 P.2d 201 (Wash. 1964), which reached the same result in the context of the Washington Nonresident

Motorist Statute, was not necessarily controlling but was highly persuasive:

> There is no such method of in-state service under [the Washington Long-Arm Statute]. However, there is the requirement of personal service of a summons and complaint on the tortfeasor who has left the state, which is a much surer guarantee of notice and due process than the more synthetic procedures provided by the statute under consideration in Smith v. Forty Million, Inc..
>
> The cases upholding the result reached in Smith v. Forty Million, Inc., supra, could now be said to be "legion." It is interesting to note that the reasoning in most of the opinions hinges not on the service of some public official in the state, but rather upon the proposition that a tolling statute does not apply when a plaintiff has available to him a means of securing personal service on a defendant which will make possible a personal judgment against him.

454 P.2d at 228. Accord, Adm'r of Reed v. Rosenfield, 51 A.2d 189, 191 (Vt. 1947); Benally v. Pigman, 429 P.2d 648, 650 (N.M. 1967) and authorities cited in Addendum III(A).

There is some authority to the contrary. See, Addendum III(B). It has, however, been variously characterized by some as a "relatively small and ever-diminishing minority view," Tarter v. Insco, 550 P.2d 905, 907 (Wyo. 1976), and as "comparatively miniscule," Summerrise v. Stephens, supra, 454 P.2d at 227 n.4. See, for example, Duke University v. Chestnut, 221 S.E.2d 895 (N. C. 1976) and Dicker v. Binkley, 555 S.W.2d 495 (Tex. Civ.

App. 1977)[7/]. These cases tend to construe the tolling statutes literally, without considering the purpose behind them, and characterize the issue as one for the legislature to deal with. There are also those cases which involve tolling statutes with provisions that are distinguishable from § 78-12-35. See, Addendum III(B).

III. The Better Interpretation Of § 78-12-35 is That It Does Not Toll A Limitations Statute Unless The Prospective Defendant Is Not Amenable To Process.

Whether the Snyder decision is controlling or not, plaintiff's interpretation would mean that the statute of limitations would never expire as to a medical malpractice claim filed against a nonresident doctor.[8/] It may safely be assumed that many defendants, such as those out-of-state doctors who do their

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7/ Texas has held, however, that the tolling statute does not toll the Texas medical malpractice statute of limitations since the latter statute shows a clear legislative intent that it not be tolled under any circumstance except those expressly permitted. Hill v. Milani, 678 S.W.2d 203 (Tex. Civ. App. 1984). Our § 78-14-4 exhibits a similar intent.

8/ As to those defendants that intentionally evade service, an exception could be made. See, for example, Williams v. Malone, supra, 589 S.W.2d at 882.

residencies in Utah, may leave Utah and never return. As this Court noted in Snyder:

> Under the interpretation and application of our statute contended for by the plaintiff, that the defendant's absence from the state tolled the running of the statute of limitations, an action against a nonresident motorist would practically never be outlawed. A purported claim could rest in suspense and an action could be commenced 10, 20 or any number of years after its origin, even though the plaintiff could have sued and served process anytime he desired. It seems to us that such a result would comport with neither reason nor justice. Nor would it harmonize with the policy of the law of allowing a reasonable time for the bringing of an action, but of providing a definite limitation of time in which it must be brought or the matter be put at rest.

15 Utah 2d at 256, 390 P.2d at 916.

That policy is expressly set forth in the Health Care Malpractice Act at § 78-14-2:

> In enacting this act, it is the purpose of the legislature to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

Statutes of limitations are "pragmatic devices to save courts from stale claim litigation and spare citizens from having to defend when memories have faded, witnesses are unavailable

by death or disappearance and evidence is lost." Duke v. Housen, 589 P.2d 334, 340 (Wyo. 1979). That policy is poorly served by tolling a limitations statute when there exists no reason to do so.

CONCLUSION

At no time did this plaintiff have to look to the tolling statute for help while seeking a method to serve defendant. The method she did eventually use could have been used earlier. The purpose of § 78-12-35 is to prevent the statute of limitations from running when the courts of this state cannot acquire personal jurisdiction over a defendant. When delay is not necessary, it should not be permitted. Defendant, therefore, asks that the decision of the lower court granting summary judgment in his favor be affirmed.

DATED this 28th day of August, 1985.

SUITTER AXLAND ARMSTRONG & HANSON
Attorneys for Defendant

Francis Carney

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Francis J. Carney, Esq.

CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing **Brief of Respondent** were served this 28th day of August, 1985, by depositing them in the U. S. Mail, postage prepaid, to:

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Francis Carney

ADDENDUM

I.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

II.

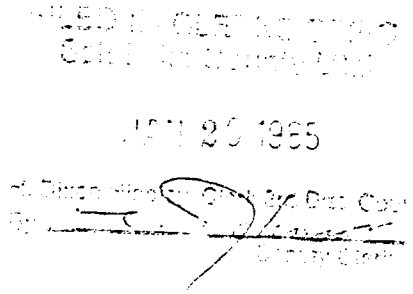
DETERMINATIVE PROVISIONS

III.

SUMMARY OF DECISIONS

I

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT



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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ELIZABETH ANN MILLSAP, by and through her guardian ad Litem, **LORRAINE COWGILL**, Plaintiff, -vs- **ALAN SOKOLOW, M. D.**, Defendant.	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** HON. JOHN A. ROKICH Civil No. C-83-4562

Defendant's Motion for Summary Judgment came on for hearing before the Court, Honorable John A. Rokich presiding, on January 14, 1985. Francis J. Carney, Esq. appeared on behalf of defendant; Frank M. Wells, Esq. appeared on behalf of plaintiff.

The Court, having read the respective memoranda submitted by counsel for the parties, having heard the arguments of counsel,

and being otherwise advised in the premises, concludes that this action is barred by the applicable statute of limitations, § 78-14-4, Utah Code Ann. (1953) and, therefore, enters its Order as follows:

It is hereby

ORDERED, ADJUDGED AND DECREED that defendant's Motion for Summary Judgment shall be, and hereby is, granted and that judgment for defendant, Alan Sokolow, M. D., and against plaintiff, Elizabeth A. Millsap, by and through her guardian ad litem, Lorraine Cowgill, shall be, and hereby is, entered, no cause of action.

MADE AND ENTERED 29 day of January, 1985.

BY THE COURT:

John A Rokich

HONORABLE JOHN A. ROKICH
District Judge

ATTEST
H. DIXON HINDLEY
Clerk

By _____
Deputy Clerk

II

DETERMINATIVE PROVISIONS

78-14-4. Statute of limitations - Exceptions - Application.

(1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence, except that:

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs; and

(b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under section 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law; but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act. 1979

78-12-35. Effect of absence from state.

If when a cause of action accrues against a person when he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action. 1953

78-27-24. Jurisdiction over nonresidents - Acts submitting person to jurisdiction.

Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

(1) The transaction of any business within this state;

(2) Contracting to supply services or goods in this state;

(3) The causing of any injury within this state whether tortious or by breach of warranty;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) Contracting to insure any person, property or risk located within this state at the time of contracting;

(6) With respect to actions of divorce and separate maintenance, the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim; or

(7) The commission of sexual intercourse within this state which gives rise to a paternity suit under Chapter 45a, Title 78, to determine paternity for the purpose of establishing responsibility for child support. 1953

78-27-25. Jurisdiction over nonresidents - Service of process.

Service of process on any party outside the state may be made pursuant to the applicable provisions of Rule 4 of the Utah Rules of Civil Procedure.

Service of summons and of a copy of the complaint, if any, may also be made upon any person located without this state by any individual over 21 years of age, not a party to the action, with the same force and effect as though the summons had been personally served within this state. No order of court is required. An affidavit of the server shall be filed with the court stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether proper service has been made.

Nothing contained in this act shall be construed to limit or affect the right to serve process in any other manner provided by law. 1953

41-12-8. Nonresidents - Effect of use of state highways - Summons and process - Manner of service - Continuances - Fees and costs.

The use and operation by a nonresident or his agent, or of a resident who has departed from the state of Utah, of a motor vehicle upon and over the highways of this state shall be deemed an appointment by the nonresident, or a resident who had departed from the state of Utah, of the lieutenant governor as his true and lawful attorney upon whom may be served all legal process in any action or proceeding against him arising from the use or operation of a motor vehicle over the highways of this state resulting in damages or loss to person or property and said use or operation shall be a signification of his agreement that process shall, in any action against him which is so served, be of the same legal force and validity as if served upon him personally within this state. Service of process shall be made by serving a copy upon the lieutenant governor or by filing a copy in his office with payment of a $2 fee. Plaintiff shall, within ten days after service of process, send notice thereof, together with plaintiff's affidavit of compliance with this act, to the defendant by registered mail at his last known address.

The court in which the action is pending may order any continuance necessary to afford the defendant reasonable opportunity to defend the action not exceeding 90 days from the date of filing the action in court. The $2 fee paid by the plaintiff to the lieutenant governor shall be taxed as costs if he prevails in the suit. The lieutenant governor shall keep a record of all processes served which shall show the day and hour of service.

III

SUMMARY OF DECISIONS

SUMMARY OF DECISIONS

A. Decisions holding that tolling statutes do not apply where service of process can be obtained.

Alabama

Peters v. Tuell Dairy Co., 35 So.2d 344 (Ala. 1948): Where service of process could have been secured on nonresident defendants under statute providing for service on Secretary of State, statute of limitations not tolled.

Alaska

Byrne v. Ogle, 488 P.2d 716 (Alaska 1971): Tolling statute does not toll statute of limitations in action against motorist who moved from the state where the defendant is subject to substituted service of process under Nonresident Motorist Statute.

Arizona

Hawkinson Tire Co. v. Paul E. Hawkinson Co., 476 P.2d 864 (1970), aff'd, 485 P.2d 825 (1971): Where service of process on foreign corporation could be effected by constructive service, corporation was not "absent" within the meaning of the tolling statute and the statute of limitations was not tolled.

Selby v. Karman, 521 P.2d 609 (1974): Statute of limitations not tolled during defendant's absence from the state where process could have been served in the state or under the Long-Arm Statute.

California

Dovie v. Hibler, 62 Cal. Rptr. 228 (Cal. Ct. App. 1967): Where defendant in an automobile accident has California driver's license and owns a vehile registered in California, the statute of limitations is not tolled by his absence from the state, so long as he can be located through exercise of reasonable diligence.

Connecticut

Colello v. Sundquist, 137 F. Supp. 649 (S.D.N.Y. 1955): Action by New Jersey plaintiffs against New York resident for injuries suffered in Connecticut auto accident. Applying Connecticut law, the court held that the tolling statute did not apply despite defendant's absence from the state where service of process on state officer was available to plaintiff.

Coombs v. Darling, 166 A. 70 (Conn. 1933): Absence from the state did not toll the statute of limitations where substituted service of process upon state officer is available to establish jurisdiction.

Tublitz v. Hirschfeld, 118 F.2d 29 (2nd Cir. 1941): Tolling statute did not toll statute of limitations where service could have been made on state officer and that officer was required to notify nonresident defendant in writing.

Delaware

Hurwitch v. Adams, 151 A. 2d 286, aff'd, 155 A.2d 591 (Del. Supr. Ct. 1959): In action for injuries sustained in auto accident, nonresident defendant was not "out of the state" within meaning of statute tolling statute of limitations since defendant could have been served with process by service on Secretary of State.

Florida

Fernon v. Itkin, 476 F. Supp. 1 (M.D. Fla 1977): In a medical malpractice action where the out-of-state defendant was amenable to service of process, the applicable statute of limitations was not tolled.

Friday v. Newman, 183 So.2d 25 (Fla. Dist. Ct. App. 1966): Absence of the defendant from the state tolls the running of the statute of limitations except if service of process can be made, either actual or substituted.

Georgia

Smith v. Griggs, 296 S.E.2d 87 (Ga. App. 1982): Where a defendant moves from the state after an auto accident

in Georgia, its courts have jurisdiction under the Long-Arm Statute and the tolling statute does not toll statute of limitations so long as process can be lawfully served.

Idaho

Blankenship v. Myers, 544 P.2d 314 (Idaho 1975): Tolling statute does not toll running of statute of limitations during defendant's absence from state where jurisdiction of defendant may be had under the Long-Arm Statute.

Lipe v. Javelin Tire Co., 536 P.2d 291 (1975): Expressly overruling Staten v. Weiss, 308 P.2d 1021 (1957), and impliedly overruling Anthes v. Anthes, 121 P. 533 (1912): Where foreign corporate defendant can be served with process outside the state under the Long-Arm Statute and can be located with reasonably diligent efforts for service, statute of limitations is not tolled.

Fullmer v. Sloan's Sporting Goods Co., 277 F. Supp. 995 (S.D.N.Y. 1967): In construing Idaho Long-Arm Statute and tolling statute, New York defendant was subject to service under Long-Arm Statute, therefore, statute of limitations was not tolled.

Illinois

Higgenbottom v. Van Veiga, 375 N.E.2d 454 (Ill. App. 1978): Where defendant is subject to jurisdiction pursuant to the Long-Arm Statute, he has not departed from the state within the meaning of the statute tolling the statute of limitations.

Indiana

American States Ins. Co. v. Williams, 278 N.E.2d 295 (Ind. App. 1972): Statute of limitations not tolled during defendant's nonresidence where defendant was at all times amenable to service of process under the Long-Arm Statute.

Daque v. Piper Aircraft Corp., 513 F. Supp. 19 (D. Ind. 1980): In wrongful death action under Indiana Products Liability Act, statute of limitations not tolled by tolling statute against out-of-state defendant so long as there is a statutory agent for service of process.

Iowa

Burkhardt v. Bates, 191 F. Supp. 149 (D. Iowa 1961): Applicable statute of limtations not tolled where nonresident defendants are subject to service of process under Nonresident Motorist Service Act.

Kokenge v. Holthaus, 52 N.W.2d 711 (Iowa 1952): Where nonresident defendants are subject to service of process under the Nonresident Motorist Service Act, applicable statutes of limitation are not tolled.

Kansas

Bray v. Bayles, 618 P.2d 807 (Kan. 1980): In medical malpractice action, "absence" from state which will toll running of statute of limitations requires that defendant be beyond reach of service of process under the Long-Arm Statute.

Carter v. Kretschmer, 577 P.2d 1211 (Kan. 1978): Statute of limitations not tolled when defendant departs state after auto accident where there was an agent within the state for service of process or where plaintiff could have been served personally under the Long-Arm Statute.

Maryland

Jolivet v. Elkins, 386 F. Supp. 261 (D. Md. 1974): Statute of limitations was not tolled during defendants' absence from the state, since under the Long-Arm Statute they were not beyond the reach of the court.

Massachusetts

Daigle v. Leavitt, 283 N.Y.S.2d 328 (N.Y. App. 1967): In an action for injuries sustained in an auto accident, brought by Connecticut residents against New York defendants in a New York court for Massachusetts accident, under Massachusetts law, where plaintiffs could have served nonresident motorist by substituted service of process, statute of limitations is not tolled.

Walsh v. Ogorzalek, 361 N.E.2d 1247 (Mass. 1977): Where service of process upon Registrar of Motor Vehicles is

available under the Nonresident Motorist Statute, tolling statute does not toll the period of limitations.

Michigan

Hommel v. Bettison, 107 N.W.2d 887 (Mich. 1961): Statute of limitations is not tolled during absence from the state of nonresident motorist since personal jurisdiction over defendant was possible through service on the Secretary of State.

Minnesota

Long v. Moore, 204 N.W.2d 641 (Minn. 1974): Where defendant moved from state after auto accident, statute of limitations was not tolled where defendant remained amenable to personal jurisdiction under the Long-Arm Statute.

Mississippi

Gulf National Bank v. King, 362 So.2d 1253 (Miss. 1978): If plaintiff can obtain process on nonresident defendant under the Long-Arm Statute, statute of limitations will not be tolled during absence. Plaintiff has the burden to show duration of absence and to show that defendant could not be served under any of means provided by the Long-Arm Statute.

Missouri

Bethke v. Bethke, 676 S.W.2d 46 (Mo. App. 1984): General statute of limitations is not tolled when the defendant is subject to personal service of process in another state under the Missouri Long-Arm Statute.

Williams v. Malone, 592 S.W.2d 879 (Mo. App. 1980): Statute of limitations is not tolled when defendant moves out of state where plaintiff knew defendant's address and could have obtained jurisdiction by out-of-state personal service under the Long-Arm Statute.

Montana

State ex rel. McGhee v. District Court of Sixteenth Judicial District, 508 P.2d 130 (Mont. 1973): Statute of limitations

not tolled so long as defendant is subject to the jurisdiction of the Montana courts and is capable of being served during the entire time under provisions of the Long-Arm Statute.

Beedie v. Shelley, 610 P.2d 713 (Mont. 1980): Statute of limitations not tolled because defendants were out-of-state where defendants were at all times subject to the jurisdiction of the Montana courts.

Nevada

Brown v. Vonslid, 541 P.2d 528 (Nev. 1975): Tolling statute was not applicable to defendant physically absent from the state since the defendant was continuously subject to service under original divorce proceedings jurisdiction.

Blotzke v. Christmas Tree, Inc., 499 P.2d 647 (Nev. 1972): Where a nonresident defendant contractor was continuously engaged in business in the state and amenable to substituted and personal service of process, the statute of limitations was not tolled.

Seeley v. Illinois-California Exp., Inc., 541 F. Supp. 1307 (D. Nev. 1982): Tolling statute did not toll applicable statute of limitations against a nonresident defendant so long as defendant was amenable to service of process through substituted service on the Secretary of State.

Simmons v. Trivelpiece, 643 P.2d 1219 (Nev. 1982): Statute which tolls period of limitations during defendant's absence from the state did not apply when defendant is otherwise subject to service of process.

New Hampshire

Bolduc v. Richards, 142 A.2d 156 (N.H. 1958): Statute of limitations not tolled against defendants who moved out of state but were amenable to substituted service of process under Nonresident Motorist Act.

New Mexico

Benally v. Pigman, 429 P.2d 648 (N.M. 1967): Tolling statute does not toll statute of limitations when defendant is

absent from the state if he can be served with process either actual or substituted.

Kennedy v. Lynch, 513 P.2d 1261 (N.M. 1973): Defendant's absence from state for much of limitation period did not toll the statute of limitations in absence of proof that defendant could not have been served under the Long-Arm Statute.

New York

Kirchen v. Ripton, 462 N.Y.S.2d 803 (Sup. 1983): In a medical malpractice and wrongful death action, the tolling statute does not apply where methods of acquiring personal jurisdiction other than by personal delivery within the state are available.

Immediate v. St. John's Queen's Hospital, 410 N.Y.S.2d 329 (1978): Medical malpractice statute of limitations not tolled because of defendant's continuous absence from the state since the claim arose out of tortious acts committed within the state and the defendant was at all times subject to New York jurisdiction under the Long-Arm Statute.

Rescigno v. Montefiore Hospital and Medical Center, 409 N.Y.S.2d 425 (1978): Under the Long-Arm Statute, New York courts had jurisdiction over defendant doctor during entire period in question and plaintiff could have obtained service of process by means other than personal delivery of Summons.

Yarusso v. Arkotowicz, 393 N.Y.S.2d 968 (1977): Where statutory authority exists for obtaining personal jurisdiction by some manner other than personal service, statute of limitations is not tolled by defendant's absence from the state even though the plaintiff may, in fact, be unsuccessful in obtaining jurisdiction by the manner so provided.

Oklahoma

Jarchow v. Eder, 433 P.2d 942 (Okla. 1967): Defendant motorist's absence from the state does not toll statute of limitations even though statute provides for suspension of such limitations when defendant is absent from the state since plaintiff could have obtained substituted personal service under the Long-Arm Statute.

McCullough v. Boyd, 475 P.2d 610, (Okla. 1970): Statute of limitations not tolled when defendant moved from jurisdiction where plaintiff, under Nonresident Motorist Act, could have served process on the statutory agent.

Oregon

Whittington v. Davis, 350 P.2d 913 (Or. 1960): Where defendant moved from the jurisdiction, the statute of limitations was not tolled since the plaintiff could have exercised his statutory right to serve substituted process upon state officer under statute permitting such service.

Rhode Island

Rouse v. Connelly, 444 A.2d 850 (R. I. 1982): Since a nonresident motorist was subject to service of process in the state, the statute of limitations is not tolled during his absence from the state.

South Dakota

Russell v. Balcom Chemicals, Inc., 328 N.W.2d 476 (S. D. 1983): Statute of limitations was not tolled so long as defendant could have been served outside state under Long-Arm Statute and could have been located for service by reasonably diligent efforts.

Tennessee

Young v. Hicks, 250 F.2d 80 (8th Cir. 1957): Nonresidence of defendant did not toll Tennessee statute of limitations where process could be obtained by service on the Secretary of State.

Texas

Davis v. B. E. & K, Inc., 595 S.W.2d 895 (Tex. Civ. App. 1980): The statue of limitations was not tolled where defendant is not amenable to service under the Long-Arm Statute.

Hill v. Milani, 678 S.W.2d 203 (Tex. Civ. App. 1984): Medical malpractice statute of limitations was not tolled by defendant's absence from the state.

Vermont

Reed v. Rosenfield, 51 A.2d 189 (Vt. 1947): Statute of limitations was not tolled in view of statute appointing Commissioner of Motor Vehicles as attorney for nonresident motorist.

Virginia

Bergman v. Turpin, 145 S.@.2d 135 (Va. 1965): Statute of limitations was not tolled by saving clause since defendant remained amenable to process.

Duke v. Hausen, 589 P.2d 334 (Wyo. 1979) (applying Virginia law): Where defendant could have been served with process under the Virginia Long-Arm Statute even though absent from the state, the statute of limitations was not tolled.

Washington

Bethel v. Sturmer, 479 P.2d 131 (Wash. 1970): Statute of limitations was not tolled during defendant's absence from the state unless process cannot be served upon him.

Summerrise v. Stephens, 454 P.2d 224 (Wash. 1969): Statute of limitations was not tolled during defendant's non-residence where service of process was possible at his out-of-state address under the Long-Arm Statute.

Smith v. Forty Million, Inc., 395 P.2d 201 (Wash. 1964): Statute of limitations was not tolled by nonresident defendant's absence from the state where the plaintiff had the statutory right to serve summons on the Secretary of State.

West Virginia

Gray v. Johnson, 267 S.E.2d 615 (W. Va. 1980): Where the defendant is amenable to service of process under the Non-resident Motorist Statute, his absence from the jurisdiction does not toll the statute of limitations.

Wyoming

Tarter v. Insco, 550 P.2d 905 (Wyo. 1976): Defendant's absence from the state did not toll the statute of limitations

where the he could have been served through substituted service on the Secretary of State under the Nonresident Motorist Statute.

B. Decisions holding that tolling statutes apply regardless of availability of service of process.

California

Bigelow v. Smik, 85 Cal. Rptr. 613 (Cal. Ct. App. 1970): In an action for damages arising from an automobile accident where a nonresident motorist is amenable to service of process within the state under the statute authorizing service on authorized agent, and personal judgment can be obtained, the statute of limitations is not tolled.

Dew v. Appleberry, 591 P.2d 509 (Cal. Ct. App. 1979): Statute of limitations was tolled during periods of defendant's absence from the state, even though defendant was at all times amenable to service of process.

Garcia v. Flores, 134 Cal. Rptr. 712 (Cal. Ct. App. 1976): In an action arising from an auto accident in Mexico, even if the defendant could have been served while still in Mexico, the statute of limitations did not begin to run until he returned from Mexico.

Rothbun v. Superior Court, County of San Bernadino, 87 Cal. Rptr. 568 (Cal. App. 1970): Statute of limitations was tolled where the nonresident defendant was subject to personal jurisdiction of the court, but could not be located with reasonably diligent efforts.

Illinois

Beckmire v. Ristokrat Clay Products Co., 343 N.E.2d 530 (Ill. App. 1976): Statute of limitations tolled by the manufacturer's absence from the state despite the fact that the defendant manufacturer could have been served under the Long-Arm Statute.

New Jersey

Fidelity & Deposit Co. v. Abagnale, 234 A.2d 511 (N. J. Super. 1967): Statute of limitations tolled during the period

when defendant was outside the state even though he was amenable to service of process by registered mail under the provisions of the Long-Arm Statute.

North Carolina

Duke University v. Chestnut, 221 S.E.2d 895 (N. C. App. 1976): In an action to recover for services rendered, the statute of limitations was tolled on the defendant who resided out of state at the time the cause of action arose and at all times thereafter.

North Dakota

Walsvik v. Brandel, 298 N.W.2d 375 (N. D. 1980): In a medical malpractice action against a nonresident defendant, the statute of limitations was tolled despite the availability of "long-arm" service of process.

Ohio

Bruck v. Eli Lilly & Co., 523 F. Supp. 480 (S. D. Ohio 1981): In a wrongful death action against foreign defendant, the statute of limitations was tolled if defendant is amenable to personal service within the state even though substitute service may be had by means of the Long-Arm Statute.

Couts v. Rose, 90 N.E.2d 139 (1950): The statute of limitations was tolled where defendant moved out of the state after an automobile accident even though the Nonresident Motorist Act subjected defendant to personal jurisdiction through service of process on the Secretary of State.

Saunders v. Choi, 466 N.E.2d 889 (Ohio 1984): In a medical malpractice action brought under Ohio Statute, the statute of limitations is not tolled during the period that defendant is out of state since the express language of the savings clause provided that only actions brought under special sections are tolled when the defendant leaves the state.

Vostach v. Axt, 510 F. Supp. 217 (S. D. Ohio 1981): In a medical malpractice action where the defendant moved from the state after the cause of action accrued, the statute of limitations was tolled since the defendant was not amenable to personal service within Ohio and, therefore, he is "out of state."

Texas

Dicker v. Binkley, 555 S.W.2d 495 (Tex. Civ. App. 1977): "Presence" for purposes of avoiding tolling of limitations, means actual presence and not constructive presence. Tolling provisions apply notwithstanding availability of substituted service of process on a nonresident.

Loomis v. Skillerns-Loomis Plaza, Inc., 593 S.W.2d 409 (Tex. Civ. App. 1980): Time during defendant's absence from the state -- for whatever purpose -- will not be included when calculating the period of limitations.

Sheen v. Monsanto Co., 569 F. Supp. 232 (S. D. Tex. 1983): Defendant was foreign corporation with authorized agent for service within the state. Defendant, therefore, was "present" and the statute of limitations was not tolled.

Vaughn v. Deitz, 430 S.W.2d 487 (Tex. 1968): In an action for injuries sustained in an auto accident, where the defendant moved from the state, the action was tolled even though the plaintiff could have effectuated service of process.